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No. 87-998

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1987

CITY OF RICHMOND,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

On Appeal from the United States
Court of Appeals for the Fourth Circuit

BRIEF OF THE STATE OF MICHIGAN AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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This Brief of the State of Michigan as *Amicus Curiae* in Support of Appellant is filed pursuant to Supreme Court Rule 36.4.

INTEREST OF AMICUS CURIAE

Michigan's Public Act 428 of 1980 provides that 7% of all State expenditures for the procurement of goods, services and construction shall be awarded to minority owned businesses and 5% of all such expenditures shall be awarded to women owned businesses. MCL 450.771 *et seq.*; MSA 3.540(51) *et seq.* A "minority" under the Act is a person who is "black, hispanic, oriental, eskimo or an American Indian." *Id.*

During the early 1970's the State of Michigan recognized the underutilization of minority and women owned business in state contracting. The State first attempted to address the problem by easing bonding requirements on small construction projects. *See Michigan Road Builders Ass'n v Milliken*, 571 F Supp 173, 178 (ED Mich, 1983) ("District Court opinion"). The State also created a Division of Minority Business Enterprise to provide managerial and financial assistance to minority business. *See* Public Act 165 of 1975, MCL 125.1221 *et seq*; MSA 3.540(31) *et seq*. Later the State adopted a modest, non-binding goal of one percent minority business participation in state contracting. District Court opinion, 571 F Supp at 183-4.

None of these measures, however, corrected the underutilization of minority and women owned businesses in state contracting.

A 1974 study commissioned by the State of Michigan[1] found that out of $437 million dollars in state contracts for goods and services, only an estimated $225,000—or 0.05% of the total—had been awarded to minority owned businesses.[2] Yet, based on 1969 U. S. Economic Census data, there were more than 8,000 minority owned businesses in Michigan, with gross receipts of nearly $320 million and distributed over more than 50 construction, manufacturing,

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1. "A Public Procurement Inventory on Minority Vendors State of Michigan," by Urban Markets Unlimited, Milwaukee, Wisconsin, July 1974. See District Court opinion at 179-181.

2. The "Urban Markets Study" defined a minority owned business enterprise as "a business in which one or more minority persons own or control at least 50 percent of a given enterprise. Such persons include Black Americans, American Indians, Spanish-Americans, Oriental-Americans, Eskimos, and Aleuts." P iv (footnote).

sales and service categories which matched state purchasing requirements.[3]

The 1974 study also included a survey of state purchasing officials, which revealed "unfounded negative attitudes" against minority vendors.[4] The study noted that there was "a sizeable number of competent minority businesses in the State" and that "to rationalize that the lack of success in minority procurement is based upon minorities incompetency and non-responsiveness is not supported by the evidence."[5]

The study also noted that state agencies did not actively seek new sources of vendors, and that "the key to purchasing success with minority vendors is the will to do business." The study concluded with the finding that "*State procurement practices are not equitable in the treatment of minority vendors.*" (Emphasis in the original.)[6]

In 1976 minorities represented about 14% of the total population of Michigan, and owned about 6% of the businesses in the five major industrial sectors. *See Michigan Road*

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(3)

According to 1977 U. S. Economic Census data, the number of minority owned businesses in Michigan increased to 10,840 with gross receipts of nearly $580 million. There were twice as many women owned businesses (21,727), with gross receipts of nearly $1.5 billion. See 1977 Survey of Minority Onwed Business Enterprise (Table 2b) and 1977 Economic Census Women Owned Businesses (Table 2), Selected Statistics by Geographic Division, State and Industry Division (Michigan), U. S. Bureau of the Census.

(4)

District Court opinion at 179.

(5)

Id. at 181.

(6)

Id.

Builders Ass'n v Milliken, 834 F2d 583, 594 n. 13 (6th Cir, 1987) ("Court of Appeals opinion").

Although nearly 6% of all businesses in the State were minority owned and nearly 12% were women owned, each group received only one percent or less of annual state contracting expenditures.

In March 1976, a small business task force also found that "the State does not require contractors to solicit bids from small and minority subcontractors." *See* District Court opinion, 571 F Supp at 183. In May 1978, the Michigan Department of Civil Rights found that employee status reports submitted by state contractors "have consistently shown minorities and women to be excluded, underemployed or concentrated in stereotyped positions."[7]

In March 1979 Michigan House Bill 4335 was introduced and finally passed both houses of the legislature in December 1980, after more than a year and a half of debate and amendments. It was signed by the Governor on January 13, 1981 as Public Act 428 of 1980.

Under Public Act 428, the combined totals of prime contracts and subcontracts actually awarded to certified minority and women owned businesses apply to the goals. Based on the availability of minority and women owned businesses, state agencies have discretion to "set aside" prime contracts or require subcontracting to minorities and women under the Act.

In July 1981, 36 associational and individual plaintiffs brought suit in U. S. District Court against the Governor of

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[7] "A Report to the Governor on Implementation of Executive Directive 1975-6," May 15, 1978 Michigan Department of Civil Rights.

Michigan, and other State officials and departments, alleging that Public Act 428, on its face, violated their rights under the Equal Protection Clause of the Fourteenth Amendment and 42 USC §§ 1981, 1983 2000d and 2000e.

On August 12, 1983, the District Court granted the State's motion for summary judgment, finding that "there was sufficient evidence before the (Michigan) Legislature to make a finding of past intentional discrimination," and that Public Act 428 was a reasonable means of achieving its remedial purpose, in light of the criteria discussed in *Fullilove v Klutznick*, 448 US 448 (1980). Accordingly, the District Court held that Public Act 428 did not violate the Equal Protection Clause or federal civil rights law.

Plaintiffs appealed, and on November 25, 1987, the U. S. Court of Appeals for the Sixth Circuit, over a dissenting opinion, reversed the District Court and found that Public Act 428 violates the Fourteenth Amendment.

In its majority opinion, the Sixth Circuit relied in part on the Fourth Circuit's decision in *J. A. Croson Co v City of Richmond*, 822 F2d 1355 (4th Cir, 1987) in invalidating Public Act 428. *See* Court of Appeals opinion, 834 F2d at 590, 594-5 n. 14. Both *Croson* and *Michigan Road Builders* purportedly apply the constitutional standards for assessing remedial, affirmative action programs set forth in *Wygant v Jackson Board of Education*, 476 US 267, 106 S Ct 1842 (1986).

Since the same substantial federal questions are involved in both cases, and because the disposition of *Croson* will have a substantial bearing upon the *Michigan Road Builders* case, the State of Michigan has an interest as *amicus curiae*.

ARGUMENT

"The government unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *United States v Paradise*, ____ US ____, 107 S Ct 1053, 1065 (1987). However, the government also has an affirmative obligation to prohibit and remedy the effects of discrimination by contractors in government contracting. *See Fullilove*, 448 US at 475 ("the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities").

Government policy barring *employment* discrimination by government contractors has been in place since the mid-1950's. *See* Executive Order No 10479, 3 CFR 961 (1949-53); Executive Order No 10557, 3 CFR 203 (1954-58); and Executive Order 11246, 3 CFR 339 (1964-65). *See also* Michigan's Public Act 251 of 1955 and Sec 209 of the Elliott-Larsen Civil Rights Act of 1976, MCL 37.2209; MSA 3.548(209).[8] However, those provisions do not apply to discrimination by government contractors who refuse to subcontract with minority and women owned businesses.

State and local governments need only have "sufficient evidence" to establish "a firm basis for believing that remedial action is required." *Wygant v Jackson Board of Education, supra*, 106 S Ct at 1848 (Powell, J., plurality opinion for the Court) and 106 S Ct at 1853 (O'Connor, J., concurring). The evidence and the remedy will vary in gov-

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[8]

Both federal and state governments have also instituted administrative enforcement programs to insure "contract compliance" with equal employment opportunity. *See, eg*, 41 CFR Part 60 (Office of Federal Contract Compliance). The Michigan State Administrative Board, by resolution dated April 16, 1968, requires bidders on state contracts to demonstrate compliance with equal employment opportunity requirements prior to being awarded a contract.

ernment contracting, depending on whether the discrimination is by the government or by government contractors. While the Michigan legislature had before it evidence of discrimination by both government officials and government contractors, the City of Richmond only focused on discrimination by government contractors in developing its Minority Business Utilization Plan.

The Fourth Circuit errs in holding that the Richmond Plan can only be upheld based on a showing of prior discrimination by the governmental entity itself. *See J. A. Croson Co v City of Richmond, supra,* 822 F2d at 1358 and 1360. As the Court noted, there was "no showing that qualified minority contractors who submitted low bids were passed over" or that they had been "excluded from the bidding pool." *Id.*, at 1359. The Plan, however, does not attempt to remedy discrimination by the City against minority contractors as bidders on prime contracts. Instead, the Plan seeks to remedy the pattern of discrimination by prime contractors, as well as the local construction industry, which denied subcontracts to minority businesses and blocked their growth and development.

The purpose of affirmative action is to dismantle prior patterns of discrimination and to prevent discrimination in the future. *Local 28 of Sheet Metal Workers v EEOC,* ____ US ____, 106 S Ct 3019, 3049 (1986). In fashioning a complete remedy to prior discrimination, the government must take into account the underrepresentation of minorities in the relevant population, when that underrepresentation reflects a prior history of "purposeful exclusion." See *United Steelworkers v Weber,* 443 US 193, 212 (1979) (Blackmun, J., concurring); *see also,* discussion of *Weber* in *Johnson v Transportation Agency, Santa Clara County, California,* ____ US ____, 107 S Ct 1442, 1452-3 n. 10 (1987); and *Croson,* 822 F2d at 1365 n. 11 (Sprouse, J., dissenting).

As the Fourth Circuit observed in its original decision, "judging the set aside percentage by reference to the existing small proportion of MBE's in the economy" would tend to perpetuate, rather than dismantle, the prior pattern of discrimination. See *Croson*, 779 F2d 181, 191 (4th Cir, 1985), *vacated*, 106 S Ct 3327 (1986).

The City of Richmond had before it evidence that minority owned businesses had received only 0.67% of the City's construction contracts for the five year period 1978-1983. In addition, there was evidence that blacks constituted less than one percent of construction contractors in all crafts in the Richmond areas, which, in turn, reflected the history of racial exclusion from the industry in the nation as a whole. *Croson*, 822 F2d at 1363, 1364 at n. 8. (Sprouse, J., dissenting). There were no black members of the local contractors' association in Richmond. *Id.*, at 1365. The City, therefore, had a firm basis for believing that the same pattern of purposeful exclusion in the nation's construction industry, existed in the local construction industry as well. *Id.*, at 1364.

Richmond's remedial goal is designed to remedy that prior pattern of discrimination, which carried over to city contracts, by creating a demand for minority businesses within the same local industry that had previously excluded them and prevented their development. See *J. A. Croson Co v City of Richmond*, 779 F2d 181, 185 (4th Cir, 1985), *vacated and remanded*, ____ US ____, 106 S Ct 3327 (1986).

In achieving its remedial objective, Richmond's 30% subcontracting requirement does not unduly burden non-minority prime contractors. Non-minority contractors are not precluded from bidding on prime contracts. Under governing principles of public contract law, they are not de-

prived of any vested rights,[9] as in the case of layoffs. *See Wygant*, 106 S Ct at 1851 (Powell, J.). The Richmond Plan affects only future contracting *opportunities* for non-minority subcontractors, thereby diffusing the burden. *Id.*

It is obvious that the 30% subcontracting requirement does not attempt to achieve "racial balance" based on Richmond's 50% minority population. Given the June 30, 1988 expiration date of the Plan, the 30% goal assures "promptness in the administration of relief,"[10] as well as being a reasonable mid point level of remediation. See *Fullilove*, 448 US at 513-4 (Powell, J., concurring).

In *Fullilove*, the Court recognized the broad remedial powers of Congress under the Constitution to require local units of government to "set aside" 10% of federal funds for minority businesses on local public works projects in remedying "societal discrimination." *Fullilove*, 448 US at 477-8 and 483-4. While the Richmond Plan does not restrict itself to remedying discrimination by the governmental unit itself, neither does it paint with as board a brushstroke as Congress.

The Richmond Plan reaches only as far as the City's contracts reach—as far, too, as the City's affirmative obligations under the Fourteenth Amendment. To the extent that the City's contracts contributed to the maintenance of prior patterns of discrimination in the local construction industry, the

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[9]

Michigan law, *e.g.*, provides that bidders on public contracts have no vested rights in the prospective award of a public contract. See *City Communications, Inc v City of Detroit*, 650 F Supp 1570 (ED Mich, 1987); *Kasam v City of Sterling Heights*, 600 F Supp 1555 (ED Mich, 1985); *Malan Construction Corp v Board of County Road Commissioners*, 187 F Supp 937 (ED Mich, 1960).

[10]

See United States v Paradise, _____ US _____; 107 S Ct 1053, 1071 (1987).

Richmond Plan is a measured and appropriate remedial response, mandated by the Fourteenth Amendment.

CONCLUSION

Under the standards set out in *Fullilove*, the Richmond Minority Business Utilization Plan is within the scope of the City's governmental and constitutional authority to dismantle and remedy prior patterns of discrimination in city contracting. *Wygant* does not detract from that authority. The Plan, therefore, should be upheld under the Fourteenth Amendment.

Respectfully submitted,

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